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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 546

CLAYTON M. JONES and AIMEE JONES, His Wife, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statement	3, 4, & 5
Argument	5
Conclusion	12

TABLE OF CASES

Allen v. Moesman, 46 Fed. 2d 891	7
Building & Loan Assoc. v. Sohn, 54 W. Va. 101	10
Brown v. Simms, 22 Ind. App. 317, 53 N. E. 779	11
Brown v. Robinson, 175 N. E. 269	7
Brown v. Board of Appeals, 327 Ill. 644, 159 N. E. 225	7
Cook v. Massey, 38 Idaho 264, 220 P. 1088	7
Corbett v. State Board, 188 Calif. 289, 204 P. 823	7
Craig v. Boyes, 11 P. 2d, 673	7
Commission v. Dee, 222 Mass. 184, 110 N. E. 287	7
Chisholm v. Georgia, 2 Dall, 419	8
Collins v. Hayden, 104 Kan. 351, 179 P. 308	10
Darius v. Apostolos, 68 Colo. 323, 190 P. 510	7
Dickle v. Nashville Abstract Co., 89 Tenn. 431	11
Eastern Railway v. Matthews, 20 Ariz. 282	7
Eagle Pitcher Co. v. Mansfield Paint Co., 194 NYS, 386	10
Eddington v. Northwestern Bell Co., 201 Iowa 267	12
Factor v. Laubenheimer, 290 U. S. 276	11
First National Bank v. Burke, 201 Iowa, 944, 216 N. W. 287	7
Glazer v. Shepard, 233 N. Y., 236	11
Gilbert v. Greene, 185 Ky. 817	7
Hagenbuck v. Reed, 3 Nebr. 17	11
Houston v. Thornton, 122 N. C. 368	11
Kilbourn v. Thompson, 103 U. S. 168	8
Leversee v. Reynolds, 13 Iowa 310	11
Mays v. Robertson, 172 Ark. 279	7

Page

Merchants National Bank v. Continental Nat'l Bank, 98 Calif. App. 523 12
Mulroy v. Wright, 185 Minn. 84 11
Miller v. Robertson, 266 U. S. 243 12
Mercado v. U. S., 183 Fed. 2d, 486 10
Nix v. Hedden, 149 U. S. 304 8
New Jersey State Board of Optometrists v. Kresge, NJL 495, 181 Atl. 152 12
Pfleuger v. U. S., 121 Fed. 2d 12
Piedmont Railroad Co. v. U. S., 30 Fed. 2d, 421 12
People v. Smith, 246 Mich. 393 7
Rash v. Allen, 24 Dela. 444 7
Stewart v. Overholser, 186 Fed. 2d, 339 10
Scott v. Mayor, 186 Ga. 652 10
State v. Phelps, 171 Wis. 13 8
Smith v. State, 172 N. E. 911 7
State v. Leuch, 155 Wis. 500 7
Trading Stamp Co. v. Common, 224 Ky. 136 7
U. S. v. Certain Lands, 12 FS, 345 11
U. S. v. Simms, 1 Cranch (US) 252 10
U. S. v. Hartwell, 6 Wall. (US) 385 10
U. S. v. Union Pacific, 20 Fed. Sup. 665 12
Walgreen v. Indian Commission, 323 Ill. 194 7
West v. Lysle, 302 Pa. 147 8
Welch v. Com. of Internal Revenue, 63 Fed. 2d, 976 .. 7
Wiley v. Solvay Process, 215 N. Y. 584 7

STATUTES CITED

28 U. S. Code 1254 1
28 U. S. Code 1346(B) 2
28 U. S. Code 2671-2680 2

SENATE DOCUMENTS

Senate Doc. 232, 74th Cong., 2d Sess., p. 101 8

HOUSE DOCUMENT

H. R. Doc. No. 562, 77th Cong., 2d Sess. (1942) 6

Page

BILLS IN CONGRESS

H. R. 12178, 68th Cong., 1st Sess. (1923) .....6 & 7
H. R. 6716, 69th Cong., 1st Sess. (1925) .....6 & 7
H. R. 8914, 69th Cong., 1st Sess. (1925) .....6 & 7
H. R. 9285, 70th Cong., 1st Sess. (1927) .....6 & 7
H. R. 17168, 71st Cong., 3d Sess. (1930) .....6 & 7
H. R. 15428, 71st Cong., 3d Sess. (1930) .....6 & 7
H. R. 5065, 72nd Cong., 3d Sess. (1933) .....6 & 7
H. R. 129, 73rd Cong., 1st Sess. (1933) .....6 & 7
H. R. 8561, 73rd Cong., 2d Sess. (1934) .....6 & 7
H. R. 2028, 74th Cong., 1st Sess. (1935) .....6 & 7
H. R. 7236, 76th Cong., 1st Sess. (1939) .....6 & 7
H. R. 5299, 77th Cong., 1st Sess. (1941) .....6 & 7
H. R. 5373, 77th Cong., 1st Sess. (1941) .....6 & 7
H. R. 6463, 77th Cong., 2d Sess. (1942) .....6 & 7
H. R. 817, 78th Cong., 1st Sess. (1943) .....6 & 7
H. R. 1356, 78th Cong., 1st Sess. (1943) .....6 & 7
H. R. 181, 79th Cong., 1st Sess. (1945) .....6 & 7
S. 1912, 69th Cong., 1st Sess. (1925) .....6 & 7
S. 4377, 71st Cong., 2d Sess. (1929) .....6 & 7
S. 4567, 72nd Cong., 1st Sess. (1931) .....6 & 7
S. 1833, 73rd Cong., 1st Sess. (1933) .....6 & 7
S. 1043, 74th Cong., 1st Sess. (1935) .....6 & 7
S. 2690, 76th Cong., 1st Sess. (1939) .....6 & 7
S. 2207, 77th Cong., 2d Sess. (1942) .....6 & 7
S. 2221, 77th Cong., 2d Sess. (1942) .....6 & 7
S. 1114, 78th Cong., 1st Sess. (1943) .....6 & 7

LAW REVIEW ARTICLES

18 Va. L. Rev. 703 11
19 Va. L. Rev. 742 11
52 Harv. L. Rev. 394 12
51 Harv. L. Rev. 558 12
30 Geo. L. J. 462, 464, (1942) 6

REPORTS

S. Rep. No. 1400, 79th Cong., 2nd Sess. (1946) p. 33 .. 10
H. Rep. No. 1287, 79th Cong., 1st Sess. (1945) p. 6 ... 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No.

CLAYTON M. JONES and AIMEE JONES, His Wife, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Roy St. Lewis and Carl L. Shipley, on behalf of Clayton M. Jones and Aimee Jones, his wife, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on October 28, 1953.

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 207 F. 2d 563 and in the Record. (R. 45).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S. Code 1254.

QUESTIONS PRESENTED

1. Whether Section 2680(h) of the Federal Tort Claim Act, 28 U.S.C. 2671-2680, prohibits suits against the government on claims arising out of negligent misrepresentation.

2. Whether the trial court's refusal to accord plaintiffs the jurisdictional benefits of 28 U.S.C. 2671-2680 is a denial of due process of law.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

28 U.S. Code 1346(b) provides in pertinent part:

> "Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of all such actions on claims against the United States, for money damages, * * * for injury or loss of property, or personal injury or deaths caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

28 U.S. Code 2674 provides in pertinent part:

> "The United States shall be liable respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances * * *."

28 U.S. Code 2680(h) provides in pertinent part:

> "The provisions of this chapter and section 1346 (b) of this title shall not apply to— * * *
>
> (b) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."

U.S. Constitution, Amendment V, provides in pertinent part:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *."

STATEMENT

Plaintiffs owned 70,888 shares of common stock of the Empire State Oil Company, Thermopolis, Wyoming, until January 1948, when they sold said stock. Practically all of Empire's oil production and reserves were contained in a 1000 acre tract of land known as Hamilton Dome in Hot Springs County, Wyoming. The United States owned the oil and gas rights in said land and leased it to Empire, and received royalties therefrom based on the production of oil.

On October 28, 1946, plaintiff Clayton M. Jones, acting for himself and his wife, wrote a letter to the U. S. Geological Survey as follows:

CLAYTON M. JONES
ATTORNEY AT LAW
NEW JONES BUILDING
113 EAST SECOND STREET
JAMESTOWN, NEW YORK

October 28, 1946.

United States Geological Survey,
Washington, D. C.

Gentlemen:

I am anxious to get Professional Paper 125 on Hamilton Dome, Wyoming.

I would also like to know what is the thickness of the Tensleep sand underneath this dome and also how much of same is saturated and also how many barrels of oil per acre it is estimated to contain and the quality or gravity thereof.

If there is any charge whatsoever will you kindly inform me and I will at once send same.

Trusting that you can be of assistance in this matter since practically all of the lands on this dome are gov-

ernment acreage and the government gets a royalty from the production, and thanking you for many past favors, I am

Very truly yours,

/s/ CLAYTON M. JONES.

On November 29, 1946, defendant answered as follows:

UNITED STATES
DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY
WASHINGTON 25, D. C.

Nov 29 1946

Mr. Clayton M. Jones,
New Jones Building,
113 East Second Street,
Jamestown, New York.

My dear Mr. Jones:

Reference is made to your request of October 28 for a copy of Professional Paper 125 and certain data on the Tensleep sand, Hamilton Dome, Wyoming.

Professional Paper 125 does not contain any data on Hamilton Dome, and it is believed that you meant to refer to Professional Paper 145, entitled "Geology and oil and coal resources of the Oregon Basin, Meeteetse, and Grass Creek Basin quadrangles, Wyoming" by D. F. Hewett, published in 1926. Both of these papers are out of print, but it is probable that copies may be available for inspection in your local library or in the library of various colleges and universities in your locality.

The total thickness and thickness of the saturated section of the Tensleep sand is variable, but the productive area at Hamilton Dome is 1,000 acres. The ultimate recovery, the major portion of which will be from Tensleep sand, is estimated to be on the order of 17,400 barrels per acre. As of January 1, 1946, about 30 per cent of the recoverable reserves of the field had been produced. The gravity of Tensleep sand oil is about 17° A.P.I.

If further information on the field is desired, it is suggested that you submit your request directly to the Northwestern Regional office of the Geological Survey, Box 400, Federal Building, Casper, Wyoming.

Sincerely yours,

(S.) W. E. WRATHER,
Director.

Plaintiffs relied upon defendant's letter in fixing the sale price of their stock in Empire. As a result of defendant's negligence in estimating the reserves in the Hamilton Dome tract, plaintiffs suffered a loss of $236,376.04. Plaintiffs brought suit against the Government for damages under the Federal Tort Claims Act, 28 U.S.C., Sections 2671-2680. The United States Court of Appeals, Second Circuit, held that Section 2680 (h) of the Federal Tort Claims Act prohibits suits against the Government on claims arising out of "negligent misrepresentation."

ARGUMENT

The questions presented in this petition are of novel and far-reaching importance in that they involve the basic construction to be given the Federal Tort Claims Act, one of the most important remedial statutes ever enacted into law by the Congress of the United States. The Federal Government waived its sovereign immunity to tort claims with enactment of Title IV of the "Legislative Reorganization Act of 1946", P.L. 601, 79th Cong., 2d Sess. (Aug. 2, 1946 ¶¶ 401-424. This legislative reform undertaken by the 79th Congress represented the end product of nearly a century and a quarter of careful consideration The opinion of the court below cuts the heart out of the Act.

As long ago as February 23, 1832, John Quincy Adams said: "There ought to be no private business before Congress. There is a great defect in our institutions by want of a court of Exchequer or Chamber of Accounts. * * * A deliberative assembly is the worst of all tribunals for the administration of justice." 8 *Memoirs of John Quincy*

Adams (1876) 479-480. Abraham Lincoln, in a message to Congress on December 3, 1861, approved the principle of federal liability in tort, setting forth that it was as important for the Government to render prompt justice against itself as it was to administer it between individuals. *Miller, Life and Works of Abraham Lincoln* (1907), *State Papers* 37. On January 14, 1942 President Roosevelt sent a message to Congress endorsing the idea of federal liability on negligence claims. "As the Congress knows, this question has been considered many times before. During the past 20 years, members of Congress have frequently pointed out that the procedure for relief of tort claims by special act is slow, expensive, and unfair both to the Congress and to the claimant, and several attempts have been made to enact legislation submitting all negligence claims to administrative or judicial determination." H.R. Doc. No. 562, 77th Cong., 2d Sess. (1942) 2. Members of Congress had themselves expressed dissatisfaction with private bills and urged a reformed procedure as to torts. See 30 Geo. L. J. 462, 464 (1942). The report of the Joint Committee on Organization of the Congress recommended that Congress delegate to the federal courts authority to hear and settle tort claims against the Government. Sen. Rep. No. 1011, 79th Cong., 2d Sess. (1946) 25. On approximately thirty occasions during the last quarter century Congress had considered methods of removing the Federal Government's sovereign immunity as to torts, H.R. 12178, 68th Cong., 1st Sess. (1923); H.R. 6716, 69th Cong., 1st Sess. (1925); H.R. 8914, 69th Cong., 1st Sess. (1925); S. 1912, 69th Cong., 1st Sess. (1925); H.R. 9285, 70th Cong., 1st Sess. (1927); H.R. 17168, 71st Cong., 3d Sess. (1930); H.R. 15428, 71st Cong., 3d Sess. (1930); S. 4377, 71st Cong., 2d Sess. (1929); S. 4567, 72nd Cong., 1st Sess. (1931); H.R. 5065, 72nd Cong., 3d Sess. (1933); H.R. 129, 73rd Cong., 1st Sess. (1933); H.R. 8561, 73rd Cong., 2d Sess. (1934); S. 1833, 73rd Cong., 1st Sess. (1933); H.R. 2028, 74th Cong., 1st Sess. (1935); S. 1043, 74th Cong., 1st Sess. (1935); H.R. 7236, 76th Cong.,

1st Sess. (1939); S. 2690, 76th Cong., 1st Sess. (1939); H.R. 5299, 77th Cong., 1st Sess. (1941); H.R. 5373, 77th Cong., 1st Sess. (1941); H.R. 6463, 77th Cong., 2d Sess. (1942); S. 2207, 77th Cong., 2d Sess. (1942); S. 2221, 77th Cong., 2d Sess. (1942); H.R. 817, 78th Cong., 1st Sess. (1943); H.R. 1356, 78th Cong., 1st Sess. (1943); S. 1114, 78th Cong., 1st Sess. (1943); H.R. 181, 79th Cong., 1st Sess. (1945), finally culminating in the passage of the Federal Tort Claims Act. And for the first time in U.S. history the citizen had a remedy against his Government for its negligent torts.

From the above legislative history it is obvious that the whole spirit and purpose of the act was to get *all negligent tort claims* out of Congress and private bills and into the federal courts.

Thus, in construing the words used in the Act, it is necessary to determine their meaning in accordance with that legislative scheme and purpose. *Welch* v. *Comm. Int. Revenue*, 63 F. 2d 976; *Craig* v. *Boyes*, 11 P. 2d 673; *Brown* v. *Board of Appeals*, 327 Ill. 644, 159 N.E. 225; *Gilbert* v. *Greene*, 185 Ky. 817, 216 S.W. 105; *Commission* v. *Dee*, 222 Mass. 184, 110 N.E. 287; *Wiley* v. *Solvay Process*, 215 N.Y. 584, 109 N.E. 606; *State* v. *Leuch*, 155 Wis. 500, 144 N.W. 1122.

Starting from the point of departure of statutory purpose and intent, the words in the Act must be given their usual, ordinary, and natural meaning. *Miller* v. *Robertson*, 266 U.S. 243, 45 S. Ct. 73, 69 L. ed. 265; *Allen* v. *Moesman*, 46 F. 2d 891; *Eastern Ry.* v. *Matthews*, 20 Ariz. 282, 180 P. 159, 7 A.L.R. 1149; *Mays* v. *Robertson*, 172 Ark. 279, 288 S.W. 382; *Corbett* v. *State Board*, 188 Calif. 289, 204 P. 823; *Darius* v. *Apostolos*, 68 Colo. 323, 190 P. 510, 10 A.L.R. 986; *Rash* v. *Allen*, 24 Dela. 444, 76 Atl. 370; *Cook* v. *Massey*, 38 Ida. 264, 220 P. 1088, 35 A.L.R. 200; *Walgreen* v. *Ind. Comm.*, 323 Ill. 194, 153 N.E. 831, 48 A.L.R. 1199; *Smith* v. *State*, 172 N.E. 911; *First Nat. Bank* v. *Burke*, 201 Iowa 994, 216 N.W. 287; *Trading Stamp Co.* v. *Common*, 224 Ky. 136, 5 S.W. 2d 910; *Brown* v. *Robinson*, 175 N.E. 269; *People*

v. *Smith,* 246 Mich. 393, 224 N.W. 402; *West* v. *Lysle,* 302 Pa. 147, 153 Alt. 131; *State* v. *Phelps,* 171 Wis. 13, 176 N.W. 217; See also *Nix* v. *Hedden,* 149 U.S. 304, 37 L. ed. 745.

Petitioners have a constitutional right to have the established judicial rules of statutory construction applied to the Federal Tort Claims Act in determining jurisdiction as to their claim. *U. S. Const., Amd't V.*

2. The decision of the Court below turns upon its conclusion that Section 2680 (h) of the Federal Tort Claims Act prohibits suits against the Government arising out of *negligent misrepresentation.* This conclusion is premised upon a construction of the word "misrepresentation" as it occurs in Section 2680 (h), as follows:

> "Since 'deceit' means fraudulent misrepresentation, 'misrepresentation' must have been meant to include negligent misrepresentation." (R. 45, *et seq.*)

Petitioners contend this is an erroneous statement of the law, and deprives them of statutory and constitutional rights, and destroys the purpose of the Federal Tort Claims Act, and is an unconstitutional usurpation of the legislative function by a judicial court in that it purports to change the structure of the Act by judicial action. Essential functions of the legislature are not to be usurped by the judiciary. *Sen. Doc.* 232, *74th* Cong., 2d *Sess.*, p. 101. The duty of the federal courts is to judge, not legislate. *Chisholm* v. *Georgia,* 2 Dall. 419, 433 (1793); *Kilbourn* v. *Thompson,* 103 U.S. 168 (1881).

3. Petitioners contend that Congress considered many bills and chose words with care in passing the Act, and that the clear and unmistakable legislative purpose was a waiver of sovereign immunity as to *all negligent torts.*

The pertinent language of 28 U.S.C. 1346(b) is clear:

> " * * * the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, * * * for injury or loss of

property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

The language of the section leaves no doubt but that Congress conferred jurisdiction on the courts to hear *all negligence* claims, not only for personal injury, but for loss of property as well. The language used is all inclusive, and in keeping with the purpose of the Act to remove negligence claims from the halls of Congress to the courts.

Title 28, U.S.C. 2674, bears out this interpretation:

> "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances * * *."

Here it is reemphasized that the Congressional purpose in the Act is to put the Federal Government in the same position as a private person as to tort claims.

The only limitation on federal liability is that set forth in Section 2680 by the Act:

> "The provisions of this chapter and Section 1346 (b) of this title shall not apply to * * *
>
> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, *misrepresentation*, deceit, or interference with contract rights." (Emphasis supplied.)

The Congress itself has made it clear that Section 2680 (h) excepts only *intentional* torts from those for which the Government accepts liability:

> "This section (28 U.S.C. 2680) specifies *types* of claims which *would not* be covered by this title. They include

> * * * *deliberate torts* such as assault and battery; and others: * * *." (Emphasis supplied.) S. Rep. No. 1400, 79th Cong., 2nd Sess. (1946), p. 33; H. Rep. No. 1287, 79th Cong., 1st Sess. (1945) p. 6.

It is as clear as language can make it that the term *misrepresentation* as used in Section 2680 (h) is confined to *intentional* misrepresentation, and that *negligent misrepresentation* is included among the body of torts for which the Government stands ready to have its liability tested in the courts. Any other construction throws Section 2680 (h) into hopeless conflict with Section 1346 (b) which expressly includes *all negligent torts*. It is a well established principle of statutory construction that words in different parts of a statute must be referred to their appropriate connection so as to render none of them useless or superfluous, and to give each its proper force and effect so as to avoid inconsistencies, under the theory of "*reddendo singula singulis.*" By it, if the sense of the statute so requires, as in the case at bar, clauses and phrases are to be taken distributively. *U. S.* v. *Simms* (U.S.), 1 Cranch 252, 2 L. ed. 98; *U.S.* v. *Hartwell* (U.S.), 6 Wall. 385, 18 L. ed. 830; *Building and Loan Assoc.* v. *Sohn*, 54 W. Va. 101, 46 S.E. 222. Upon application of this principle, it is submitted, *negligent misrepresetnation* cannot be excepted from the Act.

3. The Federal Tort Claims Act is *remedial* in nature. As such it should receive a liberal construction in order to promote justice and carry out its purpose. *Stewart* v. *Overholser*, 186 F. 2d 339; *Mercado* v. *U.S.*, 183 F. 2d 486, 487; *Collins* v. *Hayden*, 104 Kan. 351, 179 P. 308. This is especially true where the result is to secure a speedier and more economical disposition of claims, as in the case at bar. *Scott* v. *Mayor*, 186 Ga. 652, 198 S.E. 693; *Eagle-Pitcher Lead Co.* v. *Mansfield Paint Co.*, 194 N.Y.S. 386, 201 App. Div. 223. The opinion of the court below fails utterly in the application of this principle. As stated by this Court, in a similar case involving a remedial statute, has said:

"This provision is highly remedial and should be liberally construed to effect the purposes of Congress and to give remedy in all cases intended to be covered." *Miller* v. *Robertson*, 266 U.S. 243, 248.

4. No part of a statute, whether it be a sentence, clause, phrase, or word, can be considered as mere surplussage or devoid of meaning. *Leversee* v. *Reynolds*, 13 Iowa 310; *Hagenbuck* v. *Reed*, 3 Nebr. 17. If the decision of the court below is allowed to stand, Section 1346 (b) of the Act is partly nullified and its purport wholly ignored.

5. The term "misrepresentation" as it occurs in Section 2680(h) is set forth in a general class of terms all having to do with *intentional torts*. It is contrary to common sense to imagine the Congress attached some other significance to "misrepresentation" than merely reference to the tort involving *intentional* misrepresentation. By application of the principle of *ejusdem generis*, "misrepresentation" must be limited to the intentional tort in accordance with the balance of the class of terms with which it is used. *Factor* v. *Laubenheimer*, 290 U.S. 276, 78 L. ed. 315; *U.S.* v. *Certain Lands*, 12 F. Supp. 345.

6. The Congress must have known that *negligent* misrepresentation is a well established principle of law, *Houston* v. *Thornton*, 122 N.C. 368, 29 S.E. 827; *Glazer* v. *Shepard*, 233 N.Y. 236, 135 N.E. 275; *Weston* v. *Brown*, 82 N.H. 157, 131 A. 141; *Mulroy* v. *Wright*, 185 Minn. 84, 240 N.W. 116; *Dickle* v. *Nashville Abstract Co.*, 89 Tenn. 431, 14 S.W. 896 (1890); *Brown v. Sims*, 22 Ind. App. 317, 53 N.E. 779, and had been recognized as a separate and distinct tort for more than half a century. Ordinarily the term "misrepresentation" used above is synonymous with the intentional tort of "fraud." Bohlen, Should Negligent Misrepresentations Be Treated as Negligence or Fraud? 18 Va. L. Rev. 703; Green, Innocent Misrepresentations, 19 Va. L. Rev. 742. Since Congress did not use the term "fraud" in Section 2680(h), it is quite obvious that the term "misrepre-

sentation" was used to describe that intentional tort in the Act. No other reasonable construction is possible. 52 Harv. L. Rev. 394; 51 Harv. L. Rev. 558.

7. Section 2680(h) is concerned with exceptions to the Act, and it is a basic rule of statutory construction that exceptions are narrowly and strictly construed, *U.S.* v. *Union Pac. Ry. Co.*, 20 F. Supp. 665; *Piedmont Ry. Co.* v. *U.S.*, 30 F. 2d 421; *Sinking Spring Water Co.* v. *Gring*, 26 Pa. Dist. 867; *Merchants National Bank* v. *Continental National Bank*, 98 Calif. App. 523, 277 P. 354, and all doubts must resolve against an exception and in favor of the general provisions of the Act. *Eddington* v. *Northwestern Bell Telephone Co.*, 201 Iowa 67, 202 N.W. 374; *N.J. State Board of Optometrists* v. *Kresge*, 181 Atl. 152, 115 N.J. L. 495. Thus it would seem "negligent misrepresentation" cannot be excepted from the Act unless specifically set forth. This Court has stated the rule:

> "The just purpose of the section is not to be defeated by a narrow interpretation, or by unnecessarily restricting the meaning of the word within technical limitations. *Miller* v. *Robertson*, 266 U.S. 243, 248.

8. When Congress confers a right it can constitutionally take it away, *Pflueger* v. *U.S.*, 121 F. 2d 732, but when Congress creates a right the courts cannot constitutionally take it away. *U. S. Const., Amdt. V.* In the case at bar petitioners had a statutory right to bring suit against the United States for negligent misrepresentation. 28 U.S.C. 1346(b) and 2671., et. seq. The court below deprived petitioners of this right by an erroneous application of the judicial rules of statutory construction.

CONCLUSION

The Federal Tort Claims Act was intended to confer a right of suit against the Government for all negligent torts. The intentional torts excepted from the Act are clearly spelled out. The Act is, itself, one of the most important

remedial statutes ever passed. It is now being tested in the crucible of application. The question of whether negligent misrepresentation is excepted from the Act is of crucial importance in the developing experience under the Act. Whether the Act succeeds or fails in its Congressional purpose, i.e., the removal of private bills for tort claims from Congress into the courts, depends to a large extent upon the proper resolution of this question.

It is respectfully submitted that this is a proper basis for certiorari and that a writ should be granted.

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Carl L. Shipley
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Washington 4, D. C.
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